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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978
No. 78-1403

ALFRED KIRSHNER,

Petitioner,

v.

UNITED STATES OF AMERICA, SECRETARY OF TREASURY, COMMISSIONER OF THE IRS, ALVIN D. LURIE, in his capacity as Assistant Commissioner, Employer Plans and Exempt Organizations, IRS, BERNARD GOLDBERG, REUBEN MITCHELL, JOSEPH SHANNON, ROBERT CHRISTEN, VICTOR CONDELLO, HARRISON J. GOLDIN, JAMES REGAN, individually and as Trustees of the Teachers Retirement System of the City of New York and ISAIAH ROBINSON, individually as former Trustee of Teachers Retirement System,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Preliminary Statement

This is an action for declaratory and injunctive relief relating to the investments made by the Trustees of the New York City Teachers Retirement System of the City of New York in securities of the Municipal

Assistance Corporation and New York City Serial Bonds, pursuant to the Amended and Restated Agreement of November 26, 1975 between eleven New York City commercial bank and the New York City pension and sinking funds.

On June 17, 1977, the District Court for the Southern District Court of New York entered a judgment dismissing the complaint. The complaint had alleged that the investments by the trustees of the Teachers Retirement System in a New York City securities violated the contract clause, Article I, Section 10 of the United States Constitution and the due process and equal protection clauses of the United States Constitution and Section 10(b) of the Securities and Exchange Act and the rulings promulgated thereunder.

In addition the complaint challenged the constitutionality of P.L. 94-236, which law continued the tax exempt status of the five city retirement systems participating in the Amended and Restated Agreement dated November 26, 1975.

On November 30, 1978, the Court of Appeals for the Second Circuit (one judge dissenting), in reversing in part the order of the District Court, held that the plaintiff, as a beneficiary of a public pension fund, has standing on behalf of the fund to bring an action under §17(a) of the Securities Act of 1933 and §10(b) of the Securities Exchange Act of 1934. The Court upheld the District Court's dismissal of the causes of action relating to the contracts clause, the due process and the equal protection clauses and P.L. 94-236.

On January 4, 1979, the municipal appellees filed with the Court of Appeals a petition for rehearing with a suggestion for rehearing en banc. During the Court of Appeals review of the petition for rehearing, this Court decided International Brotherhood of Teamsters v. Daniel, 47 U.S.L.W. 4735 (Janaury 16, 1975). The Court of Appeals has not made a determination with respect to the petition for rehearing.

QUESTIONS PRESENTED

1. Where the petitioner has continued to receive his full retirement allowance during the pendency of the litigation and he has not suffered any concrete injury with respect to his pension, does the petitioner have standing to challenge the constitutionality of P.L. 94-236 and the rulings issued by the IRS thereunder?

2. Does P.L. 94-236 deprive the petitioner of equal protection or due process of the laws?

FACTS

(1)

The plaintiff-pro se was employed as a teacher by the Board of Education of the City of New York until 1951 when he retired (B1).* During his employment he made monthly contributions from his salary to the Teachers Retirement System (TRS)(B3). Since his retirement, he has been receiving a retirement allowance of approximately $3000 a year from the Teachers Retirement Board (B3). The plaintiff age 69 had a

*Unless otherwise indicated references in parentheses preceded by a letter refer to the Appendices submitted by the petitioner in the Court of Appeals. References not preceded by a letter refer to the original papers.

life expectancy of 13 years (B3). The Board of the TRS consists of the President of the Board of Education, or an authorized representative designated by him, the City Comptroller, two persons appointed by the Mayor, one of whom shall be a member of the Board of Education, and three members of the retirement association elected by the contributors.

(2)

In June 1975, the New York State Legislature, in response to New York City's dire financial crisis, established the Municipal Assistance Corporation. McKinney's New York Public Auth. Law §3033(1). MAC was authorized, through a series of legislative enactments, to issue more than five billion dollars in notes and bonds. §3033(2).

On September 9, 1975, the New York State Legislature passed the New York State

Financial Emergency Act for the City of New York. L. 1975, Chapters 868-870. After setting forth a statement of findings demonstrating that New York City was in financial emergency, the Legislature created the New York State Emergency Control Board, a state agency which was given certain supervisory authority over the finances of New York City. L. 1975, Ch. 868, §2(7). The Act also required the Emegency Control Board to develop with city officials a three year plan which would help improve the city's financial condition. L. 1975, Ch. 868, §2(8).

As part of the financial plan, the Legislature authorized the pension funds and the retirement systems to purchase bonds of the Municipal Assistance Corporation in principal amounts as set forth in

the statute. L.1975, Ch. 868, §(2).* The Teachers Retirement System was authorized to purchase $275,000,000 in MAC bonds. The legislation also declared that MAC securities are reasonable, prudent and legal investments for the fund and that no trustee would incur any liability to any person beneficially interested in a pension or retirement fund by reason of an investment in MAC securities. Retirement & Social Security Law §179, L. 1975, Ch. 868, 6(2).

As a further part of the three year plan, the City Pension Funds (including the Teachers Retirement Fund and the New

*The legislation also "directed" the pension funds to purchase MAC bonds. To the extent the statute sought to compel the purchases it was held to violate Article V, Section 7 of the New York State Constitution. Sgaglione v. Levitt, 37 NY 2d 507, 337 N.E. 2d 592 (1975).

York City Sinking Funds) and eleven commercial banks entered into an agreement on November 26, 1975 whereby the Pension Funds, among other things, agreed to purchase specified amounts of New York City Serial bonds. The Teachers Retirement Fund (TRF) agreed to purchase $860 million of city bonds over a three year period (B5).

(2)

This action was commenced on February 16, 1977. The plaintiff, in his complaint, alleges that the Trustees of the Teachers' Retirement system have acted illegally in using TRS assets to purchase "poorly rated, illiquid, high risk New York City obligations" (B5). The complaint further alleges that these purchases of MAC and City securities have reduced the value of the retirement fund to the detriment of the

retirees and for the benefit of those currently employed (B5).

The complaint apparently alleges three separate claims for relief. In a cause of action based on 42 U.S.C. §1983, the plaintiff contends that the trustees' investments violated his rights as a beneficiary of the pension fund under Article I, Section 10 of the United States Constitution, and the due process and equal protection clauses (B9).

Plaintiff also contends that P.L. 94-236 is unconstitutional because it continues the tax exempt status of the five city retirement systems participating in the agreement (B5, 14).

The third cause of action alleges that the trustees, in their requests to the Internal Revenue Service for a ruling on the System in light of the November 26

Agreement, did not make full disclosures as required by Section 10(b) of the Securities Exchange Act of 1934.

The relief requested in the complaint includes an injunction enjoining the defendant trustees from further sales of Teachers Retirement System corporate assets to purchase New York City obligations, a declaration that P.L. 94-236 is unconstitutional; a settting aside of the revenue rulings by the Internal Revenue Service; and a determination that the November 26 Agreement is invalid (B16).

On March 4, 1977, the defendant trustees moved to dismiss the complaint on the grounds of failure to state a claim and lack of jurisdiction. On April 8, 1977, the Federal defendants moved to dismiss on the same grounds.

On May 9, 1977, the plaintiff moved for a preliminary injunction. In his supporting affidavit, Mr. Kirscher stated that the trustees' purchases of New York City and MAC bonds have harmed his vested interest in the Retirement System, which he values at $39,000 (Kirshner, Affid, p. 1). Mr. Kirschner also stated that the purchase of $860 million dollars of New York City bonds would require the sale of hundreds of millions of sound corporate securities "inflicting irreparable injury of more than $100 million on the pensioner minority of TRS which owned 87% of the funded assets" (id. at p. 4).

OPINIONS BELOW

District Court Opinion

In denying the motion for a preliminary injunction and dismissing the

complaint, the District Court discussed at length each of the causes of action asserted by the plaintiff. The Court noted that each of the issues raised in the instant case had been rejected in other cases, citing in particular Sgaglione v. Levitt, 37 NY 2d 507, 337 N.E. 2d 592 (1975) and, Withers v. Teachers Retirement System, 765 Civ. 4474 (S.D.N.Y., Dec. 22, 1976) affd. ___F. 2d____, Dkt. No. 78-6059, opinion dated January 16, 1979.

With respect to petitioner's claim that P.L. 94-236 is unconstitutional, the Court noted that the petitioner, to have standing, was required to be aggrieved by the application of the statute or the agency's action pursuant to the enabling legislation (Appendix B, attached to petition for certiorari at p. 23a). It found that the "unadorned speculation" that

the petitioner might suffer financial loss did not permit him to attack the IRS decision to continue the tax exempt status of the funds (p. 23a). The Court noted that the challenged action must directly violate the petitioner's rights (p. 23a).

In reviewing the merits of the legal issues, the Court rejected the due process argument noting that the petitioner does not have a vested property right in controlling the investment decisions of the trustees (24a). With respect to the equal protection clause, the Court found the P.L. 94 236 had a reasonable relationship to legislative goal; the fiscal preservation of the City of New York (25a).

Court of Appeals Opinion

In rejecting the petitioner's claim that P.L. 94-236 and the IRS ruling issued pursuant to the statute that the contemplated transactions would not constitute prohibited transactions, are unconstitutional, the Court* found that the petitioner had not shown that he or the fund were harmed by the statute or IRS ruling (Appendix A to petition for Certiorari at p. 10a). The Court noted that the protection of the fiscal integrity of the City of New York is a valid state goal and not in contravention of Article I, Section 10 of the Constitution (11a). The Court further noted that the governmental

*One Judge dissented with respect to the holding that the petitioner has standing to sue under §10b(5), The judge agreed with the majority in that portion of the opinion upholding the constitutionality of P.L. 94-236 (id, at pp. 15a-16a).

objective of protecting the fiscal integrity of the City by removing any question of the tax exempt status also compels a rejection of the claims relating to due process and equal protection (id at pp. 11a-12a).

ARGUMENT

THE PETITIONER, WHOSE RETIREMENT PAYMENTS BEGAN IN 1953, AND EACH OF THE MEMBERS OF THE PETITIONER'S CLASS HAVE CONTINUED TO RECEIVE THEIR RETIREMENT ALLOWANCES. PETITIONER HAS NOT SUFFERED ANY INJURY FROM P.L. 94-236 AND THEREFORE DOES NOT HAVE STANDING TO CHALLENGE ITS CONSTITUTIONALITY.

ASSUMING, ARGUENDO, THAT PETITIONER HAS STANDING TO SUE, P.L. 94-236 AND THE IRS RULING ISSUED THEREUNDER ARE CONSTITUTIONAL.

(1)

It is petitioner's burden, as required by Article III of the United States Constitution, to establish a concrete and reviewable controversy between himself and the

Federal Government with respect to P.L. 94-236 and the IRS ruling issued pursuant to the statute. To satisfy his burden, the petitioner must show an injury to himself that is likely to be redressed by a favorable decision. Simon v. Eastern Ky. Welfare Rights Organization, 426 U.S. 26, 38 (1976); Warth v. Seldin, 422 U.S. 490, 498-499 (1975). The petitioner must show "some threatened or actual injury resulting from the putatively illegal action." Linda R.S. v. Richard D., 410 U.S. 614, 617 (1973). See also, Data Processing Service v. Camp, 397 U.S. 150, 151-154 (1970). Speculation concerning a potential injury to the plaintiff is not sufficient to establilsh standing to sue. Simon v. Eastern Ky. v. Welfare Rights Organization, supra, 426 U.S. at p. 44.

Applying the principles set forth above, the petitioner in the instant case does not have standing to challenge the constitutionality of P.L. 94-236. The petitioner has not suffered any injury as a result of P.L. 94-236. When the petitioner retired in 1951, he was entitled to a retirement allowance of $3000 a year. He has received every payment to which he is entitled and is currently receiving his retirement allowance. In addition every member of the purported class in the instant case is receiving the entire retirement allowance to which he is entitled.

The absence of a sufficient injury to permit the petitioner to sue is emphasized by the issue sought to the reviewed by this Court which involves a challenge to a statute passed by Congress. It is the New York City Teachers Retirement System,

not Congress which, in the exercise of its discretion, invested in MAC bonds and New York City securities. The statute P.L. 94-236 does not require any action by the Teachers Retirement System. It provides that if the Trustees, in their discretion, undertake a specified investment, the pension fund will not lose the tax exemption benefits of §401 et seq. of the Internal Revenue Code.

The trustees, even without the IRS ruling and legislation could have committed themselves to the purchase of the New York City securities. The source of the commitment is the Agreement, dated November 26, 1975, between the banks and the New York City pension and sinking funds.

It is noteworthy that if the petitioner was successful in his challenge

to P.L. 94-236, the remedy, the declaration of unconstitutionality of the statute would not redress the injury he contends he may suffer. If P.L. 94-236 were declared to be unconstitutional, the tax exempt status of the pension fund would be revoked. The result would be to place the Pension Fund in a much weaker position than it is now. Since the petitioner cannot benefit by the declaration of unconstitutionality, that, by itself, indicates that he has not suffered a sufficient injury to have standing to sue on this issue. See Simon v. Eastern Kentucky Welfare Rights Organization, supra, 426 U.S. at p. 40.

(2)

Assuming, arguendo, that petitioner has standing to sue, P.L. 94-236 does not

violate the due process and equal protection clauses of the United States Constitution. With respect to the due process and equal protection questions, on either issue the appropriate standard for an economic matter is the rational relationship test. If the challenged actions are rationally related to a lawful governmental objective, the actions will not violate the equal protection and due process clauses. See San Antonio Ind. School District v. Rodriguez, 411 U.S. 1,17 (1973).

P.L. 94-236 and the rulings issued thereunder relate to the management of the Retirement System's assets. The Retirement System's purchase of the specified amounts of City related notes and bonds was part of a complicated plan,

which included the New York City Seasonal Financing Act of 1975, authorizing the Secretary of Treasury to loan up to §2.3 billion at any one time to the City of New York, to enable the City to avoid bankruptcy. P.L. 94-236 permitted the various City pension and sinking funds to purchase the bonds without the loss of tax exempt status. The loss of the tax exempt status would have required the Funds to pay an immediate tax on current assets and contributions to the plans (Report of House Ways and Means Committee dated February 23, 1976, at p. 4). The possibility of this huge tax could have discouraged the pension plans from participating in the November 26, agreement and, without their participation, the entire financial plan could have been destroyed. The fiscal integrity of the City constitutes a valid state purpose and

bears a rational rationship to the challenged legislation, P.L. 94-236.

The implicit suggestion in the petition for certiorari and the amicus brief submitted by the National Education Association on behalf of the petitioner is that, even if the City of New York defaulted on its obligations and went into bankruptcy, the strength of Retirement System would remain undiminished.

This assumption is not justified. A default by the City would have an adverse effect on the Teachers Retirement System. All members of the system would have been affected. These points are emphasized repeatedly in the February 23, 1976 report of the Committee on Ways and Means, House of Representatives on H.R. 11,700 a bill which permits the trustees of the

various New York City pension funds to invest in New York City Serial Bonds without losing the System's tax exempt status.

The purchase of the New York City Serial Bonds by the pension funds was a key part of the plan to avert default (Report, pp. 14, 22). In his testimony before the Committee, Jack Bigel, pension consultant to the Munciiapl Labor Committee, testified that, in the event of the City's bankruptcy, the Pension Funds would be able to meet their obligations primarily to the retired members for a period not in excess of 6 to 8 years (Report, pp. 30, 32-33), Bernard Goldberg, a trustee of the New York City Teachers Retirement System, also testified that the Pension Funds' purchases of New York City obligations protected the interests of the present and future benefi-

ciaries of the retirement system (Report, p. 42).

The portion of the House Ways and Means Report which indicates that the the present fund, without further contributions, would be exhausted in eight to ten years assumes that all of the fund would be paid to retired members. This assumption is not justified. Article V, Section 7 of the New York State Constitution (impairment clause) also protects the rights of those people who have contributed to the fund but who have not yet retired. If the City was compelled to declare bankruptcy, some provision would have to be made for the members who have not yet retired. As a consequence, the fund would not be able to pay the retired members even for the short eight year period. The investments by the trustees challenged here

enable the Funds to protect the investments by the active employees to assure that the retired members will be able to receive the entire pensions to which they are entitled.

It should be noted that this goal has been fulfilled. As we noted above, each retired member of the fund has continued to receive his retirement allowance. At the same time, the City's financial health has improved and with it the Funds abililty to protect the rights of the employees who have contributed to the fund but who have not yet retired.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

May 2, 1979.

Respectfully submitted,

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